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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 568

PINEY COKING COAL LAND COMPANY,
A CORPORATION,
Petitioner,

versus

ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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ERNEST K. JAMES, STATE TAX COMMISSIONER FOR THE STATE OF WEST VIRGINIA.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, Piney Coking Coal Land Company, seeks a writ of *certiorari* to the Supreme Court of Appeals of West Virginia to review its judgment rendered June 22, 1940 (R. 198-209), rehearing denied September 16, 1940 (R. 237), reversing a decree of the Circuit Court of Raleigh County,

West Virginia, pronounced in this cause August 23, 1939, and deciding that the lien of the State, under Chapters 106 and 108, Acts Legislature 1937, (2) (Apx., pp. 23-24) for gross sales and consumer's sales taxes, penalties and interest which accrued during the years 1937-38 (R. 1-6), was (a) superior in priority to all rights of petitioner under coal mining leases entered into in 1925 and 1930, respectively (R. 21-63), including the right of reentry by petitioner for default made by the lessee, prior to appointment of receivers to take charge of its property, in the payment of rents, royalties and taxes, under the provisions of Section 15, Article 4, Chapter 36, Code West Virginia, (3) (Apx., p. 24), which expressly conferred on petitioner the right to reenter the demised premises for such default, and (b) was also superior and prior to the lien held by petitioner for unpaid rents, royalties and taxes under the terms of its purchase of the property of the lessee at the sale thereof made June 1, 1939, under decree of May 18, 1939, and the confirmation of that sale and purchase by the court without objection by the Tax Commissioner by a final decree pronounced in the cause August 23, 1939 (R. 172, 128, 167, 169-71), and from which decree the Tax Commissioner did not appeal. His petition for appeal expressly states that the decree from which appeal was sought was the decree of August 23, 1939, "which decree ratified and confirmed the decree of May 18, 1939, overruling certain exceptions filed by your petitioner to the report of the Commissioner in Chancery, under date of May 4, 1939" * * * (R. 1-2, 123 R. 1-2, 4). No attempt was made by the Tax Commissioner to appeal from any other decree pronounced in this cause. This application is made prior to December 14, 1940, U. S. C. A. Title 28, Section 350.

II.

The jurisdiction of this court is asserted under Judicial Code, sub-division "(b)" of section 237, amended U. S.

C. A. Title 28, sub-division "(b)" of section 344, and Rule 38 of this Court.

III.

1. The provision of the Federal Constitution invoked by the petitioner is section 10 of Article I, inhibiting a State from passing a law impairing the obligation of contracts.

2. The provision of the Amendment to the Federal Constitution invoked by the petitioner is the due process clause of section 1 of the XIV Amendment.

IV.

Summary and Brief Statement.

The facts are that by indenture of lease dated June 16, 1925, petitioner let and leased to Leccony Smokeless Coal Company 2065.45 acres of land in Raleigh County for coal mining purposes (R. 21-31—Stipulation omitting parts of record in Supreme Court, R. 182-86), for the term of twenty years, with the right of renewal, and provided for the payment of a minimum annual rental of $10.00 per acre, plus taxes as a part of the rent on the demised premises, with the right to the lessee to mine sufficient coal at the stated royalty rate per ton to reimburse itself for the minimum rental and taxes paid (R. 24-26). By express terms of the lease petitioner was given the right to re-enter the demised premises for (a) the non-payment of rents, royalties and taxes; (b) the breach of any covenant contained in the lease; (c) if the lessee be adjudged to be insolvent, or (d) in case the property of the lessee, or any part thereof, was placed by order of court in the hands of a receiver (R. 26-27, 30-31). The lease also contained a covenant against assignment, subletting and underletting of the demised premises, in whole or in part, without the license and consent in writing under seal of petitioner being first obtained, and provided

that any transfer or assignment by operation or process of law should be deemed an assignment within the meaning of that provision and a violation of such covenant (R. 28-29). It further provided that in case of forfeiture of the lease for any cause, all improvements, buildings, mining machinery and equipment used by the company in carrying on mining operations, and which might be necessary or convenient for the continued operation of the mines, should be left on the premises in good condition, so that mining might be continued by petitioner, or its tenants without delay or interruption and should revert to and become the property of petitioner (R. 30).

By Supplemental Indenture of Lease dated July 1, 1930, petitioner also leased to the same coal company 974.81 acres of other lands in Raleigh County for coal mining purposes, to be taken and held by the lessee under and subject to the payment of the rentals and royalties and to all the terms of the several leases therein referred to, among which is the lease of June 16, 1925 (R. 56-60 erroneously referred to as being dated June 8, 1925, Lease Book No. 3, page 446. R. 33, 39, 106, 175).

On December 15, 1938, Leccony Smokeless Coal Company, being then insolvent, Harry E. Moran, a stockholder owning more than one-fifth of its outstanding capital stock, filed his bill of complaint and exhibits in the Circuit Court of Raleigh County, West Virginia, to convene creditors, have receivers appointed to take charge of the assets of the company and to wind up its affairs under sections 81 and 82 of article 1, chapter 31, Code of West Virginia, 1931 (R 9) (4) (Apx. 24-25). The bill charged that the company was hopelessly insolvent and prayed that the business and affairs of the company be wound up, the corporation dissol ed and the appointment of receivers to take charge of and preserve the property of the company and administer the same as the court might from time to time decree; that

the receivers to be appointed be authorized to continue the operation of the mine and for that purpose to take possession and control of its mining leases and leaseholds, mining machinery, equipment and all other property and for the issuance of such injunctions as justice and equity might require; that the cause be referred to a commissioner to ascertain and report the property owned by the company, its debts, the liens and priorities of creditors and for general relief. Among the debts of the company set up in the bill were rents and royalties owing and due petitioner in the approximate sum of $18,000.00, and taxes owning to the State of West Virginia and the United States of America approximating $30,000.00 (R. 9, 12, 16, 19-21).

Leecony Smokeless Coal Company filed its answer to the plaintiff's bill which substantially admitted its allegations and joined in the prayer for the appointment of receivers, and that the court take possession and control of and administer its property (R. 69-71). The Circuit Court entered a decree December 15, 1938, appointing two special receivers of the property of the company and among other things decreed that, *subject and subordinate to the provisions of the decree with respect to the property rights, interest and lien or liens of petitioner,* the receivers were authorized to continue the business of the company of mining and shipping coal from the property of petitioner until the further order of the court; authorized the receivers to borrow money by the issuance and sale of receiver's certificates not to exceed $50,000, which certificates were to be repaid "after the payment of all rents and royalties accrued during the receivership to Piney Coking Coal Land Company, its successors or assigns, from the sale of coal mined and shipped at the said mining plants" of the coal company. The receivers were further authorized by this decree to employ laborers and other employees in carrying on such business, "but sub-

ject and subordinate in all respects to all liens heretofore accrued and to hereafter accrue to the said Piney Coking Coal Land Company, and to all rights and remedies of the said Piney Coking Coal Land Company, as Lessor of the said Leccony Smokeless Coal Company, for rents and royalties heretofore accrued or hereafter accruing under any and all of the leases, supplemental leases and agreements held by the said Leccony Smokeless Coal Company, as Lessee of the said Piney Coking Coal Land Company, Lessor, on lands and interest in lands situated in Raleigh County, West Virginia, and described in such leases, supplemental leases and agreements". This decree also enjoined all persons, firms and corporations from instituting or further prosecuting actions at law or suits in equity against the coal company, or *in any manner interferring with the possession by the special receivers* of the property and assets of the coal company (R. 72-76).

On February 8, 1939, petitioner filed its separate answer to plaintiff's bill and set up therein rents, royalties and taxes owing to it by the coal company which had accrued for payment during the period January 1, to December 15, 1938, in the sum of $21,649.53. Petitioner also set up in its answer and claimed the benefit and protection of all of the above recited provisions of its lease and supplemental lease to the coal company, and denied the right of the Circuit Court to authorize the special receivers to continue the business of mining and shipping coal from its properties for any length of time to the prejudice of its rights as lessor of the coal company, or to the prejudice of any of its rights and remedies under its leases and especially its remedies for the collection of rents, royalties and taxes owing and due, or to become due to petitioner from the coal company under the terms of its lease and supplemental lease, and charged that any operation of the mine of the coal company must be carried on subject and

subordinate in all respects to all liens theretofore accrued or thereafter to accrue to petitioner, and to all its rights and remedies as lessor of the coal company. The answer also denied the right to sell, transfer or set over the lease and supplemental lease for any time or term without the license and consent in writing under seal of petitioner as provided in the lease, and averred that if any sale or transfer thereof was made without such license and consent of petitioner it would exercise the right which it had under the terms of its lease to declare a forfeiture thereof, and as well also of the supplemental lease, and that petitioner would accordingly declare a forfeiture thereof and forfeit the same (R. 87-88). The answer prayed, among other things, for a decretal judgment in favor of petitioner for unpaid rents, royalties and taxes; that petitioner be decreed to have the first lien against all the personal property owned by the coal company located on the leased premises, or not removed therefrom more than thirty days, for the payment of all accrued rents, royalties and taxes and for general relief (5) (Apx. p. 25) (R. 89-90).

The Commissioner to whom the cause was referred by decree of March 7, 1939 (R. 94-96), found and reported (a) that the company owned the lease of June 16, 1925, and supplemental lease of July 1, 1930 (R. 106-07), and (b) an inventory of the plant and equipment of the company; (c) that the first lien against the personal property of the coal company was for personal property taxes owing by the company to the State of West Virginia for the years 1937 and 1938 in the amounts of $694.12 and $652.60, and the personal property taxes for the current year 1939 not then ascertained; (d) that the coal company was owing and indebted to petitioner for rents and royalties under the lease and supplemental lease for the period January 1, 1938, to December 15, 1938, in the sum of $20,116.35, plus interest thereon, and taxes payable as rent on the leased

premises for the year 1938, in the sum of $3088.08; (e) that the special receivers were owing and indebted to petitioner for rents and royalties which had accrued under receivership from December 15, 1938, the sum of $4998.31 and that the total amount owing by the coal company to petitioner for rents, royalties and taxes aggregated $28,202.74, and (f) that petitioner had the *second lien* on all of the personal property owned by the coal company which was a lien second only to the above recited lien for specific personal property taxes (R. 102-4). The commissioner reported that the *sixth lien* against the property of the coal company was the lien of the United States government for taxes, (later compromised and settled R. 168-169), and the *seventh lien* was the lien of the State of West Virginia for gross sales and consumers sales taxes, penalties and interest (R. 111-112).

Among the improvements on the demised premises were 114 dwellings and 26 garages (R. 102, 129, 134). The chief value of the assets of the company consisted of the lease and supplemental lease and the improvements on the demised premises.

On May 23, 1939, the State Tax Commissioner filed exceptions to the commissioner's report stating as the ground of exception thereto that he had failed to list the liens of the State of West Virginia for gross sales and consumer's sales taxes, penalties and interest as being prior to all other liens and claims except those due the United States (R. 122-125). The Circuit Court held that the lien of petitioner for unpaid rents, royalties and taxes was prior to the lien of the State of West Virginia for gross sales and consumer's sales taxes, penalties and interest, and on May 31, 1939, a decree was pronounced *nunc pro tunc* as of May 18, 1939, overruling the exceptions of the Tax Commissioner to the report of the commissioner, in all respects confirming the report of the commissioner and directed

that sale of the property of the company be made for cash. This decree further provided that the above recited lease and supplemental lease should not be assigned or transferred to any purchaser unless the purchaser should join in the assignment and thereby agree and expressly assume all of the duties and responsibilities of the purchaser to petitioner under the terms of the lease and supplemental lease, and further on condition that petitioner should consent in writing to such assignment and transfer. The decree also provided that *should any lien creditor become the purchaser of the property of the coal company at the sale such creditor,* after paying sufficient cash to defray the costs of suit and sale and reasonable costs of maintaining the property during receivership, and to pay off and discharge prior liens, if any, to the lien held by the purchaser "according to the priority of liens as fixed and adjudicated by this decree, be entitled to have the amount of the lien so held by such purchaser applied to the payment of such purchase price" (R. 128, 163-166).

June 3, 1939, the assistant United States attorney moved the court to recommit to the commissioner the report theretofore made by him, and to set aside the decree confirming the report, in which motion certain other parties joined, but the State Tax Commissioner *did not join in this motion,* and an order was entered on that day docketing the motion of which the court took time to consider—reserving the right to thereafter modify, amend, vacate or in any way alter the decree of May 31, 1939, at any regular or special term of court thereafter held. At a subsequent term of the Circuit Court held August 23, 1939, the assistant United States attorney moved the court for leave to withdraw the motion theretofore made June 3, to set aside the decree confirming the commissioner's report, in which motion all of the parties joined who had joined with the assistant United States attorney in the motion made June

3, 1939, and they also moved the court to rescind the right reserved by the decree entered June 3, 1939, to thereafter modify, amend, vacate or alter the decree of May 18, 1939, and there being no objection made to the motion it was sustained by the court and the decree of May 18, was by this decree of August 23 in all respects ratified and confirmed. This is the decree, *and the only decree,* entered in this cause from which the State Tax Commissioner appealed to the Supreme Court of Appeals of West Virginia (R. 168-169). In the meantime, the special commissioners appointed by the decree of May 18, 1939 (R. 128, 165) to make sale of the property of the coal company, executed the decree by selling the property of the company on June 1, 1939. At this sale the comissioners offered the property of the company in parcels and as a whole. No bid was made for the property when offered for sale in parcels, and the only bid made therefor as a whole was that made by petitioner. Before the petitioner bid for the property, it delivered to the special commissioners a written memorandum addressed to them and which stated that, "All bids made by or on behalf of Piney Coking Coal Land Company for the property of Leccony Smokeless Coal Company, or any part thereof, under the decree entered in the chancery cause of Harry E. Moran against Leccony Smokeless Coal Company and others on the 18th day of May, 1939, are made subject to the terms and provisions of said decree, and to the priority of liens as fixed and adjudicated by such decree and not otherwise". This memorandum was signed by petitioner by its president and vice-president. No objection was made to the condition on which petitioner proposed to and did bid for and purchase the property. The commissioners accepted the bid of $37,500.00 made by petitioner for the property on the condition stated in the memorandum (R. 173-174). The report of sale made by the commissioners to the court, among

other things, recited the provisions of the decree of May 18, 1939, with respect to the purchase of the property by a lien creditor, and the right of the creditor to have credited against the purchase price any lien held by the purchaser against the property of the company; that Piney Coking Coal Land Company claimed the benefit of such provisions of the decree; that the company had paid to the commissioners the sum of $7,500.00 and had expressed its willingness to pay any additional sum, if any, in cash that might be required to pay the costs of the suit and the sale, and of maintaining the property during receivership, and to pay off and discharge the lien held by the State of West Virginia against the personal property of the company for unpaid specific personal property taxes for the years 1937 and 1938 amounting to the sum of $1,346.72, and also the personal property tax of the company for the year 1939, not then ascertained, and the sum of $256.45 remaining unpaid on account of the purchase price of ten Sanford Day drop bottom cars purchased by the company under conditional sale contract. The commissioners further reported that petitioner had assigned and transferred the benefit of its purchase of the property of the coal company to Leccony Smokeless Fuel Company, and that petitioner requested the Commissioner to report such sale as having been made to the Fuel Company which they reported accordingly. The Fuel Company thereupon took the benefit of the purchase of the property by petitioner and paid to the Commissioners the sum of $37,500.00 (R. 176-178). Another decree pronounced in the cause August 23, 1939, filed the Commissioner's report of sale to which there were no exceptions, and the court perceiving no just ground of exception thereto the said report, together with the sale therein reported, was in all respects ratified and confirmed, the purchase price paid for the property received and directed deposited and special commissioners appointed to

make, execute and deliver to the Fuel Company an apt and sufficient deed of sale or assignment, as the circumstances might require, transferring and assigning it the properties and leasehold estates theretofore owned and held by Leccony Smokeless Coal Company "subject, nevertheless, to the terms and provisions of decrees heretofore entered in this cause". This decree discharged the special receivers and directed them to deliver possession of the properties to the Fuel Company (R. 170-171). The State Tax Commissioner did not object to the terms of sale, or to the conditions on which it was made, or to commissioner's report of sale, or to the decree pronounced August 23, confirming the report of sale and finally adjudicating the priority of the lien of petitioner for unpaid rents and royalties over the lien of the State for its excise taxes, nor did he appeal from that decree.

On the appeal of the Tax Commissioner from the decree of August 23, ratifying and confirming the decree of May 18, the Supreme Court of Appeals held that (a) the lien of the State, under chapters 106 and 108, Acts of Legislature, 1937, for gross sales and consumer's sales taxes, penalties and interest which accrued during the years 1937-38 (R. 1-6), was superior in priority to all rights of petitioner under its lease and sublease, including the right of re-entry, for default made by the Coal Company prior to December 15, 1938, in the payment of rents, royalties and taxes, and (b) was also superior and prior to the lien held by petitioner for unpaid rents, royalties and taxes under the terms of its purchase of the property of the lessee at the sale thereof made June 1, 1939, under the decree of May 18, 1939, and the confirmation of that sale and purchase by the court without objection by the Tax Commissioner by a final decree pronounced in this cause August 23, 1939 (R. 5-30), which decree also finally adjudicated the lien of petitioner for unpaid rents and royalties to be prior to the lien of the

State for its excise taxes, *notwithstanding the Tax Commissioner did not appeal from that final decree* (R. 1-2).

V.

The questions sought to be reviewed are:

First. May the State deprive petitioner of its right to receive accrued rents and royalties owing to it by its lessee for coal mined from the demised premises, and of its vested right under the terms of its lease and supplemental lease to Leccony Smokeless Coal Company, and the provisions of Section 15, Article 4, Chapter 36, Code of West Virginia (3) (Apx., p. 24) to re-enter the demised premises for defaults made by the lessee in the payment of such rents and royalties prior to and during receivership by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal Constitutional questions involved and raised on the record of this cause by petitioner in that court?

Second. Does Section 12 of Article 13, Chapter 106, Acts Legislature West Virginia, 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease to Leccony Smokeless Coal Company within the meaning of Article I, Section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts?

Third. Does Section 17 of Article 15, Chapter 108, Acts Legislature West Virginia, 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease to Leccony Smokeless Coal Company within the meaning of Article 1, Section 10, of the Federal Constitution, providing that no State shall pass any law impairing the obligation of contracts?

Fourth. Does the taking by the State under the tax statutes of West Virginia, referred to in above questions "Second" and "Third", of so much of the proceeds derived from the sale of the property of the coal company as is necessary to discharge rents and royalties which accrued to petitioner during the period January 1, 1938, to December 15, 1938, and thereafter during the receivership, and the application thereof to the payment of excise taxes owing by the Coal Company to the State, impair the obligation of the lease and supplemental lease from petitioner to the Coal Company within the meaning of Article I, Section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts?

Fifth. Petitioner having been enjoined by the decree of December 15, 1938, by authority of Sections 81 and 82 of Article 1, Chapter 31, Code of West Virginia (4) (Apx., pp. 24-25), from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, does the taking by the State, of so much of the proceeds derived from the sale of the property of the Coal Company as is necessary to pay rents and royalties which accrued to petitioner during the period January 1, 1938, to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership under authority of the decree of December 15, 1938, deprive petitioner of its property in such part of the proceeds of such sale without due process within the meaning of Amendment XIV, Section 1 of the Federal Constitution?

Sixth. Does the taking by the State of the property right which petitioner acquired in the proceeds derived from the sale of the property of the Coal Company under the decree of May 18, 1939, and the confirmation of sale by the final decree of August 23, 1939, not appealed from by the State Tax Commissioner, and the appropriation of that property

right to the payment of excise taxes owing by the Coal Company to the State, deprive petitioner of such property right without due process within the meaning of Amendment XIV, Section 1 of the Federal Constitution?

Seventh. Does the State by the decision of the Supreme Court of Appeals in this cause deny to petitioner the equal protection of the laws of the State within the meaning of the due process clause of Amendment XIV, Section 1 of the Federal Constitution?

How Constitutional Questions Raised.

The decree of August 23, 1939, from which the Tax Commissioner appealed, was in favor of petitioner and the constitutional questions involved were raised in the Supreme Court of Appeals of West Virginia by brief filed on behalf of petitioner, pages 24-25, 33-34 (Ten copies of the brief filed on behalf of the Piney Coking Coal Land Company in the Supreme Court of Appeals of West Virginia have been lodged with the Clerk of this Court as exhibits to this petition), and petition for rehearing, pages 9-10, 13-14 (R. 211).

VI.

Reasons Suggesting Necessity for Issuance of Writ.

The following reasons indicate that the points involved in this cause are sufficiently important to justify the issuance of the writ of certiorari:

Petitioner was enjoined by the decree of December 15, 1938, from exercising the vested right it had under the express terms of its lease and sublease to the Coal Company, and under Section 15 of Article 4, Chapter 36, Code of West Virginia, to re-enter and repossess the demised premises as of its former estate therein, for defaults made by its lessee in the payment of rents and royalties prior to receivership. During receivership, and while such in-

junction was in force, tonnage royalties accrued and unpaid on coal mined from the properties of petitioner by authority of the decree of December 15, 1938, amount to $4,998.31, plus interest (R. 103). That decree expressly provided that mining operations should be carried on subject to all the rights, liens and remedies of petitioner under its lease and sublease to the Coal Company (R. 73-75). By re-entry petitioner would have acquired absolute ownership of the leaseholds and leasehold estates and of all improvements on the demised premises. It is, therefore, a matter of grave public concern that the proceeds derived from the sale of the leasehold and leasehold estates, and from the improvements located on the demised premises, belonging to petitioner have been taken by the State of West Virginia without compensation and appropriated by it to the payment of excise taxes owing to it by Leecony Smokeless Coal Company.

First. The State may not deprive petitioner of its vested right under the express terms of its lease and supplemental lease to the coal company (R. 26-28), and the provisions of section 15, article 4, chapter 36 Code of West Virginia (3) (Appx. p. 24), to re-enter the demised premises for defaults made by the lessee in the payment of rents and royalties prior to the institution of this suit, by the refusal of the Supreme Court of Appeals of West Virginia to pass on the Federal constitutional questions involved and raised on the record by petitioner.

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505, 74 L. Ed. 999;

Truax v. *Corrigan,* 257 U. S. 312 (1921), 66 L. Ed. 254;

Brinkerhoff-Faris Trust & Sav. Co. v. *Hill,* 281 U. S. 673 (1929), 74 L. Ed. 1107;

Northern Pacific Railway Co. v. *North Dakota,* 236 U. S. 585 (1914), 59 L. Ed. 735;

Aetna Life Ins. Co. v. *Dunken*, 266 U. S. 389 (1924), 69 L. Ed. 342;

Norris v. *State of Alabama*, 294 U. S. 587 (1934), 79 L. Ed. 1074;

Pierre v. *State of Louisiana*, 306 U. S. 354 (1938), 83 L. Ed. 757;

Great Northern Railway Co. v. *The State of Washington*, 300 U. S. 154 (1936), 81 L. Ed. 573.

Second-Third. (1) The chief value of the assets of the company consisted of the lease and supplemental lease and the 114 dwellings and other improvements made by the lessee on the demised premises. By re-entry petitioner would have acquired the absolute ownership of these leaseholds and improvements. Therefore, the right to re-enter was the right to this property, and both sections 12 and 17 of chapters 106 and 108 Acts 1937, as construed and applied by the Supreme Court of Appeals of West Virginia in this cause, impair the obligation of the lease and supplemental lease from petitioner to the coal company within the meaning of Article 1, section 10 of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts, in that the lien of the State under those two sections for excise taxes owing to it by the mining company is held to be prior and superior to the vested right of petitioner, under the express terms of the lease and supplemental lease and the provisions of section 15, article 4, chapter 36, Code of West Virginia, to re-enter the demised premises for defaults made by the lessee in the payment of rents and royalties prior to the institution of this suit.

Helvering v. *Bruun*, 309 U. S. 461, 84 L. Ed. 593, 105 F. (2d) 442;

Parr v. *Blue Ridge Coal Company*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;

Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;
United States v. *City of Quincy*, 71 U. S. 535 (1866), 18 L. Ed. 403;
Green v. *Biddle*, 21 U. S. 1 (1823), 5 L. Ed. 547;
LeSage v. *Switzer*, 116 W. Va. 657, 182 S. E. 797.

(2) Petitioner having been enjoined by the decree of December 15, 1938, by authority of sections 81 and 82 of article 1, chapter 31, Code of West Virginia, from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, the taking by the State of so much of the proceeds derived from the sale of the property of the coal company as is necessary to pay rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership under authority of such decree, and the application thereof to the payment of excise taxes owing by the coal company to the State, denied to petitioner the equal protection of the laws of the State of West Virginia and contravened Amendment XIV, section 1 of the Federal Constitution.

Parr v. *Blue Ridge Coal Company*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;
Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;
Dobbins v. *Los Angeles*, 195 U. S. 223 (1904), 49 L. Ed. 169;
Yick Wo v. *Hopkins*, 118 U. S. 356 (1886), 30 L. Ed. 220;
Jew Ho v. *Williamson*, 103 Fed. 10;
Park Hill Dev. Co. v. *City of Evansville* (*Ind.*), 130 N. E. 645.

Fourth. The taking by the State under sections 12 and 17, chapters 106 and 108, Acts 1937, of so much of the pro-

ceeds derived from the sale of the property of the coal company as is necessary to discharge rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, and thereafter during receivership, and the application thereof to the payment of excise taxes owing by the coal company to the State, impairs the obligation of the lease and supplemental lease from petitioner to the coal company within the meaning of Article 1, section 10, of the Federal Constitution providing that no State shall pass any law impairing the obligation of contracts, in that the Supreme Court of Appeals of West Virginia has consistently held that a landlord may not be deprived of the right to re-enter the demised premises under the provisions of section 15, article 4, chapter 36, Code of West Virginia, for default made by the tenant in the payment of rents and royalties, except upon condition that unpaid rents and royalties be discharged out of proceeds derived from the sale of property belonging to the tenant.

Parr v. *Blue Ridge Coal Co.*, 72 W. Va. 174, syl. pt. 3, 77 S. E. 894;

Pelzel v. *Pen-Mar Coal Co.*, 101 W. Va. 247, 132 S. E. 510;

United States v. *City of Quincy*, 71 U. S. 535 (1866), 18 L. Ed. 403;

Green v. *Biddle*, 21 U. S. 1 (1823), 5 L. Ed. 547;

LeSage v. *Switzer*, 116 W. Va. 657, 182 S. E. 797.

Fifth. Petitioner having been enjoined by the decree of December 15, 1938, by authority of sections 81 and 82 of article 1, chapter 31, Code of West Virginia, from exercising its right to re-enter the demised premises for defaults made in the payment of rents and royalties, the taking by the State of so much of the proceeds derived from sale of the property of the coal company as is neces-

sary to pay rents and royalties which accrued to petitioner during the period of January 1 to December 15, 1938, on coal mined by the lessee, and thereafter mined during receivership, under authority of the decree of December 15, 1938, deprived petitioner of its property in such part of the proceeds of such sale without due process within the meaning of Amendment XIV of section 1 of the Federal Constitution.

Chicago, Burlington and Quincy R. Co. v. *Chicago,* 166 U. S. 226 (1896), 41 L. Ed. 979;

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505 (1929), 74 L. Ed. 999;

State v. *Walruff,* 26 Fed. 178 (1886).

Sixth. The taking by the State of the vested property right which petitioner acquired in so much of the proceeds derived from the sale of the property of the coal company as was required to discharge rents and royalties owing petitioner by the decree of confirmation of sale pronounced August 23, 1939, *not appealed from by the State Tax Commissioner,* and the appropriation thereof to the payment of excise taxes owing by the coal company to the State, deprived petitioner of such proceeds without due process within the meaning of Amendment XIV, section 1, of the Federal Constitution.

Eakin v. *Eakin,* 83 W. Va. 512, syl. pt. 8, and pp. 520-21, 98 S. E. 608;

Cale v. *Shaw,* 33 W. Va. 299, 10 S. E. 637;

Hardman v. *Brown,* 77 W. Va. 478, syl. pt. 2, 88 S. E. 1016;

Blankenship v. *Mongini,* 105 W. Va. 530, 143 S. E. 301;

Chicago, Burlington and Quincy R. Co. v. *Chicago,* 166 U. S. 226 (1896), 41 L. Ed. 979;

Georgia Power Co. v. *City of Decatur,* 281 U. S. 505 (1929), 74 L. Ed. 999;

State v. *Walruff,* 26 Fed. 178 (1886).

Seventh. The decree of August 23, 1939, confirming the Commissioner's sale and adjudicating the right of petitioner to receive unpaid rents and royalties, out of the proceeds derived from sale of the property of the coal company, to be prior to the lien of the State under Sections 12 and 17, Chapters 106 and 108, Acts 1937, for excise taxes owing to it by the Coal Company, was a final decree from which the Tax Commissioner had the right to appeal to the Supreme Court of Appeals of West Virginia under Section 1, Article 5, Chapter 58, Code of West Virginia, (6) (Apx., p. 26) at any time within eight months from the time of the rendition of the decree under the provisions of Section 4, Article 5, Chapter 58, Code of West Virginia, (7) (Apx., p. 26), and, not having appealed from such decree, it is conclusive of the prior right of petitioner, and the taking by the State of so much of the proceeds of sale as is necessary to discharge accrued rents and royalties owing to petitioner by the coal company and the receivers, denies to petitioner the equal protection of the laws of the State of West Virginia and contravenes Amendment XIV, Section 1 of the Federal Constitution.

National Citizens Bank v. *Bank of Charles Town,* 114 W. Va. 839, 174 S. E. 420;

Barbour et al. v. *Tomkins,* 58 W. Va. 572, 52 S. E. 707;

Dobbins v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169;

Yick Wo v. *Hopkins,* 118 U. S. 356, 30 L. Ed. 220;

Jew Ho v. *Williamson,* 103 Fed. 10;

Park Hill Dev. Co. v. *City of Evansville* (*Ind.*), 130 N. E. 645.

Wherefore, your petitioner respectfully prays that a writ of certiorari do issue out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of West Virginia commanding that court to certify and send to this Court for its review and determination, on a

day certain to be therein named, a transcript of the record and proceedings herein, and that the judgment herein of the said Supreme Court of Appeals be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

PINEY COKING COAL LAND COMPANY,
By WILLIAM H. SAWYERS,
ASHTON FILE,
Attorneys for Petitioner.

FILE, SCHERER & FILE,
Of Counsel.

November, 1940.